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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 PAULINE W. ALDRICH,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of  
Social Security Administration,

15 Defendant.  
16

CASE NO. **C08-5475RBL**

AMENDED REPORT AND  
RECOMMENDATION

Noted for February 6, 2009

17 This matter has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. §  
18 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, secretary of H.E.W.  
19 v. Weber, 423 U.S. 261 (1976). This matter has been briefed, and after reviewing the record, the  
20 undersigned recommends that the Court remand the matter to the administration for further consideration.

21 INTRODUCTION

22 Plaintiff, Pauline Aldrich, was born in 1960. She completed her high school education. She  
23 reported her educational background to include two years of college, completed in February, 2005. She  
24 received no degree. (Tr 349, 578). Plaintiff has worked in several different capacities, including  
25 receptionist, raising and training horses, refuse hauler, and private health care provider. Her medical  
26 problems and physical impairments appear to have begun in 1993, following an injury to her mid-lower  
27 back when she slipped and fell on a wet floor. She has not worked since May 2000. (Tr. 137).

28 Plaintiff filed an application for Social Security Supplemental Income benefits on April 12, 2005.

1 (Tr. 329). Plaintiff alleged disability on the basis of bilateral carpal tunnel syndrome, right rotator cuff  
2 disorder, cervical disorders, obesity, asthma and fibromyalgia. The application was denied initially and  
3 upon reconsideration. (Tr. 298, 302, 303). Ms. Aldrich's hearing was conducted by an administrative law  
4 judge ("ALJ") on May 3, 2007. (Tr. 572-611). Witnesses included Ms. Aldrich and a vocational expert.

5 An unfavorable ALJ decision was rendered on June 20, 2007. (Tr. 14-25). The ALJ applied the  
6 five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §  
7 416.920. At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity  
8 since April 12, 2005, the earliest date relevant to this matter (Tr. 19, Finding 1). 20 C.F.R. §  
9 416.920(b). At step two, the ALJ found that Plaintiff had the following severe impairments: a history  
10 of torn right rotator cuff and degenerative changes in the right shoulder; degenerative disc  
11 changes of the cervical and lumbar spine; and obesity (20 CFR 416.920(c) (Tr. 20, Finding 2).  
12 20 C.F.R. § 416.920(c).

13 At step three, the ALJ found that Plaintiff's impairments did not meet or equal the requirements of  
14 a listed impairment (Tr. 20, Finding 3). *See* 20 C.F.R. §§ 416.920(a)(4)(iii), 416.920(d). The ALJ  
15 determined that Plaintiff had the residual functional capacity (RFC), 20 C.F.R. §§ 416.920(e), 416.945, to  
16 perform sedentary work. Sedentary work involves lifting no more than 10 pounds at a time, and  
17 occasionally lifting articles like files, ledgers and small tools; it is usually performed while sitting, but  
18 some standing and walking is often necessary (20 CFR 404.1567, 416.967). Plaintiff is capable of  
19 reaching overhead with her dominant, right upper extremity only occasionally, no more than 30% of the  
20 time. (Tr. 20, Finding 4). 20 C.F.R. § 416.967 (defining exertional levels of work); Social Security Ruling  
21 (SSR) 83-10, available at 1983 WL 31251 (same). At step four, the ALJ found that Plaintiff was able to  
22 perform her past relevant work as a receptionist (Tr. 23, Finding 5). *See* 20 C.F.R. §§ 416.920(a)(4)(iv),  
23 416.920(f).

24 The ALJ made an alternative step five findings given some issues regarding whether or not  
25 Plaintiff's past relevant work was performed as substantial gainful activity (Tr. 23-24). At step five, the  
26 ALJ found that, based on the above residual functional capacity, Plaintiff could perform work existing in  
27 significant numbers in the national economy; specifically noting the positions identified by the vocational  
28 expert: table worker, semiconductor bonder, and call-out operator (Tr. 24, Finding 9). *See* 20 C.F.R. §§

1 416.920(a)(4)(v), 416.920(g).

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3 Following the ALJ's adverse decision, Ms. Aldrich timely filed a Request for Review with Social  
4 Security's Appeals Council. (Tr 12, 13). Ms. Aldrich submitted contentions of counsel and additional  
5 medical evidence in support of the Request for Review, and the Appeals Council made this additional  
6 evidence part of the record. (Tr. 567-70, 571, 9). On June 21, 2008, the Appeals Council issued its notice,  
7 denying the Request for Review (Tr. 6-8), leaving the ALJ's decision as the final administrative decision.

8 Plaintiff now seeks additional review of the administrative decision denying his application for  
9 social security benefits. Plaintiff specifically argues: (1) the ALJ erred in her assessment of her severe  
10 impairments; (2) the ALJ erred in her assessment of her credibility and residual functional capacity; and  
11 (3) the ALJ erred in finding that Ms. Aldrich was capable of other employment. Defendant counter-  
12 argues that the ALJ applied the proper legal standards and that the administrative findings and  
13 conclusions are properly supported by substantial evidence in the record.

#### 14 DISCUSSION

15 This Court must uphold the determination that plaintiff is not disabled if the ALJ applied the  
16 proper legal standard and there is substantial evidence in the record as a whole to support the decision.  
17 Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is such relevant evidence  
18 as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S.  
19 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less  
20 than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v.  
21 Sullivan, 772 F. Supp. 522, 525 (E.D. Wash. 1991). If the evidence admits of more than one rational  
22 interpretation, the Court must uphold the Secretary's decision. Allen v. Heckler, 749 F.2d 577, 579 (9th  
23 Cir. 1984).

#### 24 **A. THE ALJ ERRED WHEN SHE FAILED ASSESSED MS. ALDRICH'S "SEVERE" IMPAIRMENTS**

25 Step-two of the administration's evaluation process requires the ALJ to determine whether an  
26 impairment is severe or not severe. 20 C.F.R. §§ 404.1520, 416.920 (1996). An impairment is "not  
27 severe" if it does not "significantly limit" the ability to do basic work activities. 20 C.F.R. §§ 404.1521(a),  
28 416.921(a). The Social Security Regulations and Rulings, as well as case law applying them, discuss the

1 step-two severity determination in terms of what is "not severe." According to the Commissioner's  
2 regulations, "an impairment is not severe if it does not significantly limit [the claimant's] physical ability  
3 to do basic work activities," 20 C.F.R. §§ 404.1520(c), 404.1521(a)(1991). Basic work activities are  
4 "abilities and aptitudes necessary to do most jobs, including, for example, walking, standing, sitting,  
5 lifting, pushing, pulling, reaching, carrying or handling." 20 C.F.R. § 140.1521(b); Social Security  
6 Ruling 85- 28 ("SSR 85-28"). An impairment or combination of impairments can be found "not severe"  
7 **only** if the evidence establishes a slight abnormality that has "no more than a minimal effect on an  
8 individuals ability to work." See SSR 85-28; Yuckert v. Bowen, 841 F.2d 303, 306 (9<sup>th</sup> Cir. 1998)  
9 (adopting SSR 85-28)(emphasis added).

10 Here, Plaintiff argues the ALJ failed to include fibromyalgia as a "severe" impairment despite  
11 adequate evidence indicating otherwise. Specifically, Plaintiff argues the ALJ failed to consider Dr.  
12 Karr's specific finding that Ms. Aldrich was "exquisitely tender in 18 of 18 characteristic fibromyalgia  
13 locations". (Tr. 545). Dr. Karr stated, "Patient meets the ACR criteria for fibromyalgia syndrome." (Tr.  
14 548). Plaintiff reported generalized musculoskeletal pain and chronic fatigue. (Tr. 545). In June 2006, a  
15 state agency physician, Dr. Olsen, reported Plaintiff was unable to work due to exertional limitations.

16 The ALJ acknowledged and considered this evidence, writing the following:

17 A review of the evidence shows that the claimant's asthma has not caused significant  
18 respiratory distress. She continues to smoke despite physicians' advice to stop. The  
19 claimant has a history of low TSH levels, but she has not presented with full-blow  
20 hypothyroid symptoms (exhibit B-6F). The claimant has had CTS symptoms and 18/18  
21 positive fibromyalgia trigger points, although she was not particularly limited and she had  
22 intact neurologic deficit (exhibit B-12F:3). A rheumatoid evaluation did not find any  
23 rheumatoid process, but she was diagnosed with fibromyalgia, CTS, obesity, and other  
24 impairments by history. The claimant underwent bilateral decompression in November  
25 2006 and January 2007, with significant resolution of her symptoms and return to normal  
26 hand and wrist function (exhibits B-9F; B-13F: 12-13).

27 In light of the medical record and the claimant's activities, these other impairments are not  
28 severe, but they are taken into account in assessing the claimant's residual functional  
capacity.

(Tr. 20).

Based on the legal standards noted above, Ms. Aldrich presented sufficient evidence to support a  
finding that fibromyalgia and the limitations/symptoms associated with that condition have more than a  
minimal effect on her ability to work. Accordingly, the ALJ erred when she did not include fibromyalgia  
as a "severe" impairment. Moreover, the undersigned finds the ALJ's RFC did not include all of the

1 possible limitations caused by Plaintiff's fibromyalgia.

2 After reviewing the arguments presented, the court finds the matter should be remanded for  
3 further proceedings. Further proceedings are necessary because there are outstanding issues that must be  
4 resolved before a finding of disability can be made, such as Ms. Aldrich's residual functional capacity  
5 when the ALJ includes all of her severe impairments and Ms. Aldrich's credibility in light of the  
6 fibromyalgia impairment.

7 CONCLUSION

8 Based on the foregoing discussion, the Court should remand the matter to the administration for  
9 further consideration. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
10 Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See*  
11 *also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
12 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the  
13 clerk is directed to set the matter for consideration on **January 30, 2009**, as noted in the caption.

14 DATED this 21st day of January, 2009.

15  
16 /s/ J. Kelley Arnold  
17 J. Kelley Arnold  
18 U.S. Magistrate Judge  
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